IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 787

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF FOR THE NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY IN OPPOSITION

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The court below held that there was no warrant in the evidence for the Board's ultimate finding that the labor organization in question was not suitable and competent to serve the employees as an independent bargaining agency.

The petition challenges that holding. The question involved, therefore, is whether a particular labor union is, or is not a suitable agency to represent the employees.

Every such case must be decided upon its own facts. A decision by this Court that the particular

union in question is, or is not such agency, will afford no guide in other cases.

The facts and circumstances may be widely different. The facts in this case are wholly dissimilar to those in the cases cited in the petition, viz, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Greyhound Lines*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metalurgical Corporation*, No. 436, decided February 27, 1939; *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938.

There is no question of general public interest here, nor could a decision in this case serve as a guide in the future administration of the National Labor Relations Act, unless this Court is prepared to hold that no unaffiliated labor union composed of employees of a single employer will be tolerated. Such holding we do not apprehend. It would be contrary to express provisions of the statute. Thus:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their *own choosing*; and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." (Italics ours).

SOME MISLEADING STATEMENTS CONTAINED IN BOARD'S PETITION

The petition states (pages 4 and 6) that the complaint and hearings in this case were pursuant to a charge filed with the Board by the Industrial Union

of Marine and Shipbuilding Workers of America. It fails to state that the headquarters of that organization are in Camden, New Jersey; and that it does not represent the employees of the company. The fact is that the employees of the company are represented by the Employees' Representative Committee. The employees intervened in the proceedings before the Trial Examiner, appeared and argued their case before the Board and intervened and argued the case in the proceedings before the Circuit Court of Appeals. In each such instance the employees denied the allegations of the Board's complaint with respect to their Plan of Employees' Representation and challenged the Board's right to take any action in the premises.

The petition states (page 5) that the Company, by its answer, admitted "that, in cooperation with its employees, 'it aided in putting into force and effect at its shipyard a plan of employee representation'." In purporting to quote the alleged admission, the Board omits a *vital* part of the Company's answer. The alleged admission, being paragraph 7 of the Company's answer (II R. 12)[1] is in these words and figures, to-wit:

> "(7) The Shipyard denies each and every of the allegations of paragraph 7 of said complaint except that it admits that in cooperation with its employees in *1927* it aided in putting into force and effect at its shipyard a plan of employee representation known as 'Representation of Employees.' The Shipyard alleges that

[1] The references to the record herein are to Volumes I, II, and III as explained in the petition.

said plan of representation of employees is an independent labor organization to which its employees belong." (Italics ours)

Petitioner's statement wholly ignores the material fact, stated in the answer, that what the Company did was done in the year *1927*. The alleged admission had and has no relation to any other period of time. The Company made no admission such as the Board attributes to it. What the Company did in 1927 was neither illegal nor morally wrong.

The petition states (page 8) that "The Plan" of employee representation "dates from the year 1927, *when it was first put into effect by respondent* in cooperation with its employees." (Italics ours). The Company's answer (Para. 7) (II R. 12) denies that the Company put the plan into effect and there is no evidence that the answer does not correctly state the fact. The Company did not put the plan into effect. The Plan was put into effect by the employees after they had voted on its adoption or rejection, and it was adopted by them by a vote of 2,430 to 204. (II R. 65).

The petition states (page 10) that the May 1937 revision of the Plan "*originated* in the General Joint Committee, one-half of the members of which were management representatives, and was referred for suggestion to the similarly constituted Executive Committee and to the elected representatives separately." (Italics ours). The uncontradicted evidence is that the 1937 revision was initiated by Blanton, Chairman of the Employees' Plan of Representation, himself an elected representative of the employees. He so testified. (II R. 40; 62). He was the Board's witness and

his testimony was neither contradicted nor explained away.

The petition states (page 10) that "The personnel manager and the general manager of respondent each took an *active* part in the (1937) revision of the Plan." (Italics ours). The statement is inaccurate and misleading. Blanton, the Board's witness, testified (and his testimony was uncontradicted) that "I made the original proposition (of revision) in *each* and *every* case." (II R. 40). (Italics ours). In respect to the May 1937 revision Blanton called on the personnel manager and asked to be advised of the Company's position. (II R. 62). The general manager was called in the conference (II R. 40; 62). Blanton then submitted his proposed 1937 revision to the general manager who found that Blanton's plan permitted Company representation on committees and that these representatives were permitted to vote. The general manager proposed that the Company should *not* be accorded these rights and Blanton's plan was changed so that the Company should not have representation on committees. (II R. 41). To this extent, and to this extent only, did the Company's personnel manager and general manager participate in the May 1937 revision of the Plan.

The petition states (page 11) that the 1937 Plan provides that the action of the Employees' Representative Committee "shall be final and become effective upon agreement by the Company." The statement is misleading because the petition fails to state the fact that although the provisions of Article VI have never been invoked, they were understood by

both the Employees and the Company to apply only to the contract rights of the Company under the Plan, and were not intended to affect or restrict the independence of the committee in its capacity as representative of the employees.

The petition states (page 11) that the 1937 plan provides that any article of the Plan may be amended by two-thirds of the membership of the Committee "unless disapproved by the Company within 15 days after passage." The statement is misleading because petitioner did not state the fact that although the provisions of Article IX have never been invoked and the Company has agreed to each and every of the numerous amendments proposed by the employees, the provision was understood by the Employees and the Company to mean that the Company should have the right to exercise its disapproval only in the event a proposed amendment should affect its contract rights under the Plan. The uncontradicted evidence is that the Plan is a contract binding the Company as well as a plan of employee representation.*

* This is also made apparent by the preamble by which "the principles of employee representation are hereby *reaffirmed* by the employees and the Company and to those ends the following rules are hereby adopted" (Italics ours); by Article VII, providing a procedure of adjustment by which any employee (or group of employees) may present any matter requiring adjustment *either* in person or through his representative to the elected representative committee or to the company, as the employee may elect; and by Article VIII, by which the Company *guaranteed* the independence of representatives against discrimination because of anything the employee-representative as such may do. Obviously the plan is a contract binding on the Company.

The petition states (page 12) that a copy of Committee minutes is "regularly sent to respondent's personnel manager." Petitioner failed to state that when this was done by the Committee it was wholly voluntary on their part, and was done only for the purpose of informing the Company of such matters as the Committee wished the Company to be advised (II R. 61). Petitioner failed to state that the Committee is under no obligation to send copies of its minutes to the Company (I b).

THE QUESTION STATED IN THE PETITION TO BE THE "QUESTION PRESENTED" IS NOT INVOLVED IN THIS CASE

The petition states that the "Question Presented" is

> "Whether, upon findings that respondent has dominated and interfered with the formation and administration of a labor organization of its employees and contributed financial and other support thereto, and is dominating and interfering with the administration of said labor organization, all contrary to Section 8 (2) of the National Labor Relations Act, the National Labor Relations Board, in addition to ordering respondent to cease and desist from such interference, properly required respondent to withdraw all recognition from said organization as representative of its employees for purposes of collective bargaining, and completely to disestablish said organization as such representative."

That this question arises here we deny. On the contrary, the Circuit Court of Appeals expressly recognized that upon such a finding, if supported by sub-

stantial evidence, the Board has authority to require the employer to withdraw all recognition from the organization as the representative of his employees.

Thus, the majority opinion, (I R. 418):

> "When the Board finds that an employer has created and fostered a labor organization of its employees, and has dominated its administration, in violation of Section 8 of the National Labor Relations Act, and the finding is supported by substantial evidence, the Board has authority under section 10 (c) of the Act to require him to withdraw all recognition to the organization as the representative of his employees. This rule was established in Labor Board v. Greyhound Lines, 303 U. S. 261, and Labor Board v. Pacific Lines, 303 U. S. 272, and has been followed and applied by this court in National Labor Relations Board v. Freezer, 95 F. 2d 840; National Labor Relations Board v. Wallace Mfg. Co., 95 F. 2d 819; National Labor Relations Board v. Eagle Mfg. Co., 99 F. 2d 930, Virginia Ferry Co. v. National Labor Relations Board, decided January 9, 1939; see also, National Labor Relations Board v. Oregon Worsted Co., 9 Cir., 96 F. 2d 193; National Labor Relations Board v. America Potash & C. Corp., 9 Cir. 98 F. 2d 488."

The Circuit Court of Appeals was careful to point out that it has uniformly followed and applied the rule laid down by this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra,* and *National Labor Relations Board* v. *Pacific Greyhound Lines, supra.*

What the court below did do was to disapprove the ultimate finding of the Board to the effect that the Employees' Representative Committee is incapable of serving the employees as their genuine representative for the purpose of collective bargaining. The court held that the inference that the Employees' Representative Committee is "still the creature of the Company," to use the language of the Board, cannot reasonably be drawn (Opinion I R. 420); that "there is no reasonable ground upon which the disestablishment of the organization of the men can be sustained"; and that the "purpose of the act will not be served by destroying an organization that is without doubt the chosen representative of the great majority of the employees." (Opinion, I R. 421).

THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT

Petitioner states that the decision below is in probable conflict with decisions of this Court, citing *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra; National Labor Relations Board* v. *Pacific Greyhound Lines, supra; National Labor Relations Board* v. *Fansteel Metalurgical Corporation*, No. 436, decided February 27, 1939, and *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938.

There is no substantial similarity between the facts in this case and those in any of the cases cited by petitioner.

In each of the three first above mentioned cases the employer was violently anti-union. In some, employees

were coerced into joining company unions, with threats of discharge in case the employee joined another union. In the Fansteel case the company instigated the formation of a union in the midst of a bitter labor war in its plant. The respondent here has never been anti-union.

> "There has been no action on the part of the management or by any officer or persons in a supervisory capacity in the shipyard to discourage membership in any union." (Opinion I R. 419).

There was no labor dispute, or trouble of any kind between respondent and its employees at the time the charges were preferred and heard by the Board, nor has there been before or since.

> "For more than forty-three years prior to the hearing, there has been no labor dispute or disturbance that has interfered with the operation of the yard." (Opinion I R. 419).

If, as the Act professes, and this court has held, the purpose of the Act is to protect commerce by the promotion of industrial peace, its aim is satisfied by leaving the Committee undisturbed, as the court has left it. There is no labor dispute at this yard.

Nor has respondent dominated or interfered with the Employees' Representative Committee.

> "During the whole life of the plan from 1927 until the time of the hearing before the trial examiner in August and September 1937, the company has not interefered with, discouraged, encouraged, or in any way prevented the

selection by the employees of representatives of their own choosing." (Opinion I R. 418).

These and other facts referred to in the opinion are shown by stipulations made by the Board (II R. 64 *et seq.* See also II R. 180), and by uncontradicted testimony. (II R. 60, 64, 72, 73 and 74).

The Employees Representative Committee is the choice of the great majority of the Company's employees as their representative for the purpose of collective bargaining.

> "On June 7, 1938, after the employees had been notified of the recommendation made by the trial examiner on March 9, 1938, that the Employees' Representative Committee be disestablished, a referendum with reference to the continuance of the plan was held. 3,455 workers voted to continue the plan, 562 voted to discontinue the plan and 51 ballots were void."
>
> "On June 14, 1938, the annual election was held. 4,233 out of 4,889 men present at work elected 43 representatives to serve from July 1, 1938, to June 30, 1939. 42 votes were thrown out." (Opinion I. R. 419 and Supplemental Certificate of Board II R. 180).
>
> "The management of the Shipbuilding Company has always been willing to negotiate with the Committee in regard to any matter affecting wages, hours, or conditions of work, and the Committee has been successful from time to time in securing changes in these respects beneficial to the men." (Opinion I R. 419 and stipulation II R. 64 *et seq*).

The court below, sustaining the contentions of both respondent and intervening employees, with re-

spect to the meaning of language which was certainly understood by them, construed the provision of Art VI of the Plan to the effect that action of the Committee shall "be final and become effective upon agreement by the company" and of Art. IX, amendment of the Plan, as relating only to matters affecting the Company's rights under the plan. (Opinion I R. 420). Whether the objection to these articles has become moot by their elimination since the Board's order, is therefore a question which does not arise here.

To suppose that there is any analogy between the tranquil situation existing at this yard and the turbulent labor conditions involved in the Greyhound and Fansteel cases, is to lose all sense of proportion and substitute fantastic theories for actualities.

The principal questions involved in the Consolidated Edison case, *supra*, aside from that of jurisdiction, related to the validity and effect of contracts between the Company and a union affiliated with an outside labor organization. No similar questions arise here.

The decision below does not transgress the rule laid down in *Helvering* v. *Rankin*, 295 U. S. 123-134, and similar cases. The Board's finding that at the time of the hearing the Employees' Representative Committee was incapable of serving the employees as an independent bargaining agency, is an ultimate finding which was subject to judicial review.

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts. It is subject to

judicial review and, on such review, the Court may substitute its judgment for that of the Board."

Helvering v. *Tex-Penn Oil Co.*, 300 U. S., 481, at page 491.

The facts considered by the court below in disapproving the Labor Board's ultimate finding were, to use the language of the court, "proved either by uncontradicted evidence or by stipulation of counsel," and "bear directly upon the inquiry whether or not the Employees' Representative Committee is capable of representing the employees in collective bargaining, free from domination or intereference by the employer." They are set out in the opinion (I R. 418). The greater part of the facts referred to by the court are shown by a stipulation of the Board made at the hearing (II R. 64) and by a certificate of the Board correcting and supplementing the record filed in the Circuit Court of Appeals. (II R. 180 *et seq.*).

In effect the court below held that the Board may not ignore its own stipulations and disregard uncontradicted evidence material to the issue.

In the exercise of its judicial function the Board may not cull out such parts of the evidence as tend to support a preconceived theory or any particular theory of the case, but must give consideration to all of the evidence adduced before it, to all of the facts proved at the hearing which have a material bearing upon the issue it is called upon to decide. This is not only in harmony with the principles of judicial procedure universally recognized and applied in our courts, but

is expressly required by Section 10 (c) of the National Labor Relations Act itself, by which the Board is required to make its findings "upon all the testimony taken."

This Court has only recently taken occasion to point out that the statute with respect to a judicial review of orders of the National Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission. *Ford Motor Company* v. *National Labor Relations Board*, Nos. 182 and 193, decided January 3, 1939, ...U. S.....; 83 L. Ed. 229.

In *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U. S., 568, 579, this Court, in passing upon the scope of the right and duty of the court in reviewing orders of the Federal Trade Commission, held that as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order, the court must *also* have power to examine the *whole* record and *ascertain for itself the issues presented.*

THE DECREE BELOW

Petitioner states that the court below upheld the conclusion of the Board that respondent had been guilty of violations of Section 8 (1) and (2) of the Act in dominating, interfering with and contributing support to the Plan.

This is a clear misconception of the action of the court. The court did not hold that respondent had been "guilty" of violating the Act in any par-

ticular. That respondent did cooperate with the employees in the establishment of the plan in 1927; that it did contribute to its support prior to the 1937 revision, when, following the decision of this Court, April 12, 1937, upholding the constitutionality of the Act, the plan was amended in a sincere effort to make it conform to the Act in both letter and spirit, are facts which no one questions. To that extent, and to that extent only, the court upheld the Board's findings. But it disapproved, as not supported by substantial evidence, the ultimate finding of the Board that the Committee is still the creature of the Company; that it is company-dominated and incapable of representing the employees for purposes of collective bargaining. In the light of this holding the decree of the court below is perfectly consistent.

A "cease and desist" order does not necessarily imply that the thing inhibited is being practiced up to and at the time of the order. At times it is intended to operate only to prohibit future acts. This was true of the portion of the Board's order in the Consolidated Edison case, *supra*, which related to industrial espionage.

As to that this Court said:

> "With respect to industrial espionage, the companies say that the employment of 'outside investigating agencies' of any sort had been voluntarily discontinued prior to November, 1936, but the Board rightly urges that it was entitled to bar its resumption."

See also *Guarantee Veterinary Co.* v. *Federal Trade Commission*, (C. C. A. 2) 285 Fed. 853.

Fox Film Corporation v. *Federal Trade Commission*, (C. C. A. 2) 296 Fed. 353.

From the whole tenor of the majority opinion below, it is apparent that when the court enforced the negative provisions of the Board's order,* it meant only to bar the resumption of acts lawful when done, but which had ceased, after they became unlawful.

Portions of the order could apply to nothing else than future acts. For instance, respondent is directed to cease and desist from

> "the formation or administration of any *other* labor organization of its employees, and contributing support to * * * any *other* labor organization of its employees." (Italics ours) (I R. 28).

In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra,* the order of the Board requiring withdrawal of recognition from the union in question was upheld by this Court. But the Court recognized that there may be cases in which such an order would be inappropriate. Thus, at page 268, Mr. Justice Stone, speaking for the Court said:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for with-

* For the information of the Court, we may state that respondent has posted the order required by the Circuit Court of Appeals in accordance with the requirements of its decree, and notified the Board of that fact, as directed by said decree, and that this notice was given before the petition herein was filed.

drawal of employer recognition of an existing union before an election by employees under para. 9 (c), even though it had ordered the employer to cease unfair labor practices."

The court below believed that this case presented such a situation. It said: (I R. 421)

> "The National Labor Relations Act was designed to deal with the *actualities* of industrial life in this country and to promote peace in relations between employer and employees by securing to employees the right, too frequently denied in the past, to organize and bargain collectively, with complete freedom and independence, through representatives of their own choosing. The purpose of the Act will not be served by destroying an organization that is *without doubt* the chosen representative of the great majority of the employees, even though it may be thought that their decision to restrict their spokesmen to American-born fellow workmen is unwise. To deny them this right is to ignore the express command of the statute." (Italics ours).

We respectfully submit that the Circuit Court of Appeals, dealing with the actualities of this case as disclosed by the record, rather than indulging in fanciful theories, reached a result that is not only fair and just, but that will undoubtedly best effectuate the purposes of the Act.

No questions worthy of review are presented herein. The petition should be denied.

Respectfully submitted,

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